

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL**

IN RE GUARDIANSHIP OF OLTMER

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IN RE GUARDIANSHIP OF BRITTNEY J. OLTMER, AN INCAPACITATED PERSON.

JANA BEYER, GUARDIAN OF BRITTNEY J. OLTMER, APPELLEE,

V.

ROSEMARY F. MATTERN, APPELLANT.

Filed July 31, 2012. No. A-11-868.

Appeal from the County Court for Platte County: FRANK J. SKORUPA, Judge. Affirmed.

Amy L. Mattern for appellant.

Erik C. Klutman, of Sipple, Hansen, Emerson, Schumacher & Klutman, for appellee.

MOORE and PIRTLE, Judges, and CHEUVRONT, District Judge, Retired.

PIRTLE, Judge.

**INTRODUCTION**

Rosemary F. Mattern filed a petition in the county court for Platte County to have a permanent guardian and conservator appointed for her adult granddaughter, Brittney J. Oltmer. In her petition, Mattern nominated herself to serve as Brittney's guardian and conservator. Brittney's mother, Jana Beyer, filed an answer and cross-petition in which she asked to be appointed. Following an evidentiary hearing, the county court found that Brittney was an incapacitated person and that Beyer should be appointed her guardian. Mattern has timely appealed the county court's order. We conclude that the county court did not err in appointing Beyer as Brittney's guardian.

**STATEMENT OF FACTS**

Brittney, born in August 1992, contracted spinal meningitis at 2 months of age and has since been severely mentally disabled and legally blind. Brittney is fed through a feeding tube

and functions at approximately the level of a 6-month-old infant. She has resided throughout her life with Beyer and has apparently had little or no relationship with her biological father. Beyer has four younger children, whose ages at the time of the hearing ranged from 4 to 15 years. The family, also including Beyer's husband and stepdaughter, live in a three-bedroom home where Brittney shares a bedroom with her sister and stepsister. The family includes Brittney in many of their daily activities, including shopping, walks, and family vacations. Brittney has an especially close relationship with her 10-year-old sister, who has become very knowledgeable about Brittney's care. Brittney does not speak, but she smiles, coos, and sometimes screams.

Brittney requires a feeding pump that directly places nutrients into her system. A formula must be mixed with water on a daily basis and placed in a feeding bag. She also requires a machine that suctions her saliva, because she is unable to control it. Brittney sometimes attends school for a few hours in the morning. Beyer stated that on a typical morning, she will change Brittney's diapers, make fresh formula for Brittney and place it in her feeding bag, and transport her and her wheelchair to school. Beyer and her husband share the responsibility of getting the other children off to school and back home at the end of the day. Beyer testified that she took Brittney with her when she transported the other children to and from school. Beyer also works part time for the League of Human Dignity and as a home health care aide.

Medical reports entered into evidence generally indicate that Brittney has experienced no unusual medical issues beyond that which might be expected given her profound limitations. The reports contain no indication of concern about Brittney's care or safety.

Mattern, Brittney's maternal grandmother, testified that Brittney and Beyer lived with her for 2 years shortly after Brittney's birth in 1992 and until Beyer's marriage in 1994. Mattern described Brittney as a vibrant child who is happy and particularly loves classical music. Mattern has taken Brittney to concerts, given her birthday parties, and included her in other activities with the other children. She has often accompanied Beyer to Brittney's doctor appointments and assisted with her care.

Mattern stated that she recently became concerned about Beyer's care of Brittney, observing that Beyer sometimes left Brittney alone for approximately 10 minutes while she picked up Brittney's 10-year-old sister from school and then left her in charge of Brittney while Beyer picked up other children. Mattern stated that it was dangerous to leave Brittney unattended, because she could choke or stop breathing, and that it was also unsafe to leave Brittney in the care of a 10-year-old. Mattern was also worried about one of the family's dogs, a St. Bernard, which in Mattern's opinion was not a mean dog but was an overly friendly and excitable dog that could inadvertently injure Brittney. Mattern described an incident in which the dog saw some of the children playing in the yard and simply burst through the window in its excitement. She stated that she noticed Brittney's mattress was worn and did not appear comfortable, and described an incident in March 2011 in which she felt that Beyer did not respond appropriately when Brittney began screaming. Mattern testified that she believed Brittney would fare better in a group home and acknowledged that if she were named Brittney's guardian, she would try to place Brittney in a home where she would often be able to see her family.

Following the hearing, the county court noted that there was no dispute that Brittney required a guardian but no agreement as to who that guardian is to be, observing that there is a

statutory priority for a parent to be the guardian. The court stated that while Beyer may have fallen short of the ideal care provider at times, there was no doubt that she had Brittney's best interests at heart, as did Mattern. The court named Beyer as Brittney's guardian, stating that she has coped with a situation that few would want to be in. Mattern has timely appealed from this order. Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument.

### ASSIGNMENTS OF ERROR

Mattern asserts, as restated, that the county court erred in (1) appointing Beyer as Brittney's guardian, (2) disregarding inconsistent statements by Beyer, and (3) failing to appoint Mattern as Brittney's guardian.

### STANDARD OF REVIEW

An appellate court reviews guardianship and conservatorship proceedings for error appearing on the record made in the county court. *In re Conservatorship of Gibilisco*, 277 Neb. 465, 763 N.W.2d 71 (2009). When reviewing a judgment for errors appearing on the record, an appellate court's inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

### ANALYSIS

There is no dispute that Brittney, now 19 years of age, is incapacitated and requires a guardianship. Mattern contends that it is in Brittney's best interests that she should be named as Brittney's guardian.

The relevant parts of the guardianship statute require the appointed person to be competent and exhibit the ability to exercise the powers as guardian. Neb. Rev. Stat. § 30-2627(a) and (b) (Reissue 2008). Those who qualify are then designated with priority in the following order:

- (1) A person nominated most recently by one of the following methods:
  - (i) A person nominated by the incapacitated person in a power of attorney or a durable power of attorney;
  - (ii) A person acting under a power of attorney or durable power of attorney; or
  - (iii) A person nominated by an attorney in fact who is given power to nominate in a power of attorney or a durable power of attorney executed by the incapacitated person;
- (2) The spouse of the incapacitated person;
- (3) An adult child of the incapacitated person;
- (4) A parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;
- (5) Any relative of the incapacitated person with whom he or she has resided for more than six months prior to the filing of the petition;
- (6) A person nominated by the person who is caring for him or her or paying benefits to him or her.

§ 30-2627(b).

Section 30-2627(c) further explains the process of appointing a guardian and provides, in relevant part, that “[t]he court, acting in the best interest of the incapacitated person, may pass over a person having priority and appoint a person having lower priority or no priority.”

Thus, Beyer has statutory priority for appointment as her daughter’s guardian, but the county court is nonetheless permitted to appoint a person of lower priority, such as Mattern, if doing so is in Brittney’s best interest. Both parties point to evidence that they have been extensively involved in Brittney’s life and that they love her and wish only to keep her healthy and safe. We note here that, on appeal to this court, Beyer relies heavily on a report of Brittney’s guardian ad litem that was not included in the bill of exceptions nor does it otherwise show that the report was entered into evidence. The report is included only in the transcript. There was, however, a brief discussion prior to the county court hearing that indicates that the parties wished the court to take judicial notice of the report as part of the court files.

A bill of exceptions is the only vehicle for bringing evidence to an appellate court; evidence which is not made a part of the bill of exceptions may not be considered. *Bedore v. Ranch Oil Co.*, 282 Neb. 553, 805 N.W.2d 68 (2011). Items judicially noticed are to be separately marked, offered, and received as evidence to enable efficient review by this court. *Saunders Cty. v. Metropolitan Utilities Dist.-A*, 11 Neb. App. 138, 645 N.W.2d 805 (2002). This rule must be followed in order to place the items in the bill of exceptions, which, as we have already noted, is the only vehicle for bringing evidence before us. Because the report of the guardian ad litem appears only in the transcript, it is not properly before us on appeal and cannot be considered.

Mattern complains that the county court did not give sufficient consideration to purportedly contradictory testimony on the part of Beyer. For example, Beyer’s answer to Mattern’s petition as well as her testimony at the hearing indicated that Brittney had never lived with Mattern for a period of more than 6 months prior to the filing of the petition. This testimony is significant because it pertains to § 30-2627(5), which designates priority to a relative of the incapacitated person with whom he or she had lived for more than 6 months prior to the filing of the petition. In her testimony, Beyer showed some confusion as to the intent of the questions involving her 2-year stay with Mattern. Beyer acknowledged that Brittney and Beyer lived with Mattern for 2 years following Brittney’s birth, but she also clarified that Brittney did not live on her own with Mattern. This purported inconsistency, along with some others, merely reflect minor discrepancies in Beyer’s testimony and, if anything, was a matter for the trier of fact.

The record properly before us reflects that Beyer has had sole custody of Brittney for all of her life notwithstanding the fact that Beyer and Brittney lived with Mattern for the 2 years immediately following Brittney’s birth. It is clear that Beyer and her family love Brittney and do their best to include her in their lives and their activities. The record also contains evidence that Mattern is a loving and caring grandmother. Mattern was understandably concerned about risks to Brittney from the family’s St. Bernard and the competing demands placed on Beyer from her other children as she coped with Brittney’s extraordinary needs. Nonetheless, the county court found that “nothing has convinced this court that . . . Beyer has not provided proper care for her daughter Brittney.” The court noted that providing care to Brittney was a challenge that few people would want and that, while Beyer may fall short of being an ideal care provider, most parents fall short of ideal.

After reviewing the evidence in this case, we find that the county court's decision naming Beyer as Brittney's guardian conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. Given the evidence in this case, we cannot say that the county court erred in concluding that Beyer should be Brittney's guardian.

#### CONCLUSION

For the reasons stated above, we affirm the county court's order establishing a guardianship for Brittney and naming Beyer as her guardian.

AFFIRMED.